(3)

Single Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR.

Criminal Appeal no. 786 /2000.

(2951)

16/3/2000
K.P. Kushwaha
Advocate

Appellant (in jail) :- Shahid, W/o Wahid, aged 19 years, resident of Itwari Mohalla, Shahdol, M.P.

Vs.

Respondent :- The State of Madhya Pradesh.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE, 1973.

(18)

AFR

HIGH COURT OF CHHATTISGARH : BILASPUR.

Criminal Appeal No.786/2000.

Shahid, S/o Wahid

... Appellant

Vs.

The State of Madhya Pradesh

... Respondent.

Judgment

(22-01-2001).

Hon.Shri R.S.Garg, J.

This judgment shall dispose of Criminal Appeal No.786/2000, Criminal Appeal No.959/2000 and Criminal Appeal No.843/2000.

2). The prosecution case in brief is that on 20.5.99, Sub-Inspector, S.B. Meshram, was on patrol and during the routine checking, he found a white Ambassador car, bearing No. M.P.17B/1664 coming towards the toll-tax check point. The vehicle was stopped and search was taken, in the search contraband ganja was recovered. The occupants of the vehicle when put under interrogation said that they were Shahid, Jagdish and Pramod, the present appellants. Immediately a notice under Section 50 of the N.D.P.S. Act was given to each of the appellants and after obtaining their no objection, further search was taken, contra-band ganja was recovered. After seizure, the said ganja was weighed. According to the weighment panchanama, the total quantity of ganja was about 24 kg. Two samples of 30gms. each were drawn

from the said bags and were sealed properly. The accused persons were brought to the police station and investigation went on. After some time, the said samples were sent to the laboratory for analytical report. The Chemical Analyst submitted his report, which shows that the samples were of ganja.

3. After concluding the investigation, the Challan was filed against the appellants. As the accused persons denied the commission of offence, they were put to trial. The learned trial Court after recording the evidence of prosecution, granted opportunity for the defence to lead defence evidence and after hearing the parties, recorded findings against each of the appellant, held them guilty for offences punishable under Section 20(b) for possessing, so also under Section 20(b) of the N.D.P.S. Act for transporting the Narcotic Drugs and convicted them.

4). For the first offence, the trial Court awarded 3 years R.I. to each of the appellant and also imposed fine of Rs.5,000/- each. For the second part of the charge, the Court awarded 1 year R.I., but,however, did not impose any fine. In default of payment of fine, the Court required the appellants to under-go R.I. for 6 months. The substantive jail sentences are to run concurrently. Being aggrieved by the said findings, conviction and sentences, the appellants have filed these appeals.

5). Shri Prashant Mishra, learned counsel for the appellants submits that the prosecution case is forged, concocted and manufactured, because from the statements

of D.W.1 Ramnath Polai, A.S.I. Police station Kotparh (Orissa), it would clearly appear that on 18.5.99 Sana report was registered by one Tarik Ahmed and as from Ex.D/1 it clearly appears that one A.S.I. of Jagdalpur went to Kotparh(Orissa) in search of one of the appellant accused Pramod and as from the Sana, it appears that Tilusingh went to Kotparh(Orissa) in the very same vehicle which is said to have been seized on 20.5.99, this Court must hold that right from 18.5.99 to 20.5.99 the vehicle and accused appellant Pramod were in police custody and the present appears to be a concocted case. Referring to the merits of the matter, he submitted that the prosecution has failed in proving the allegations.

6). On the other hand, learned counsel for the State submits that from the records it would clearly appear that about 24kg contra-band ganja was recovered from Ambassador Car bearing No.M.P.17B/1664. He submits that from the statement of D.W.1 it would only appear that some Sana was recorded by Tarik Ahmed, but it would not appear that the contents of the said Sana are true. He also submits that from a very perusal of the said Sana it would clearly appear that there are over-writings at the material places in the said Sana, especially, in relation to the registration number of the vehicle. He submits that the appeal deserves to be dismissed.

7). I have heard the parties at length and have gone through the statements.

8). P.W.1 Gopal who had weighed the contra-band ganja did not support the prosecution. Similarly,

P.W.2 Shiv Kumar Gupta, who is a witness of the spot did not support the prosecution. T.S.Thakur, the person who apprenhended the appellants and seized ganja, has been examined as P.W.3. In his statement, he has clearly stated that while conducting patrol in the night he found certain persons coming in a vehicle and on a search four bags of contraband ganja were recovered from the said vehicle. Ganja was weighed and thereafter samples were drawn from the said bags. In the cross-examination, it was suggested to him that the documents which were said to have been prepared by the said witness on the spot were in fact prepared by him at the police station. In paragraph 8 of the cross-examination, it was suggested to him that on 18.5.99 he had gone to village Kotparh(Orissa) and brought one of the accused and one Ambassador car to Jagdalpur. The said suggestions were denied by him and in the opinion of this Court rightly.

9). Ex.D/1-C would show that, one Tilusingh according to the said D/1-C had gone to Kotparh (Orissa) in search of Pramod. It is no-body's case nor the defence has said that P.W.3 T.S.Thakur had gone to Kotparh(Orissa). In paragraph 9 he clearly stated that contrabands were weighed before him, weighment panchanama was prepared by him and notice under Section 50 of the Act was given.

10). So far as the question of issuing a notice under Section 50 of the Act is concerned, the question is no more res-integra. This Court and the Supreme Court have repeatedly held that the provisions of Section 50 of the Act apply to personal search and not to the search of a vehicle,place,house or so. Whether a notice was given to the accused or not, whether accused could understand the notice or not, whether it was translated in Oria or not would all lose their importance in view of the legal position.

11). From the statements of P.W.4 Diwakar Upadhyaya, another A.S.I., who was posted at police station Jagdalpur as Mal-Moharrir, it would clearly appear that 24 kg. ganja was deposited with him. The facts would show that immediately after seizure of the said ganja it was brought to the police station and was given to Mal-Moharrir. The Ambassador car was also given to the said Mal-Moharrir. The relevant entries in the registers are Ex.P/16. From the statements of P.W.4 Diwakar Upadhyaya it would clearly appear that on 20th May,99, 24kg. ganja and white Ambassador car bearing No. M.P.17B/1664 was produced before him.

12). The submissions of the learned counsel for the appellants that present appears to be a case of false implication and concoction, can straight-away be rejected, in view of the quantity of ganja. If some-body wanted to fix the accused, a very ~~xxxxx~~ small quantity of ganja could have provided the foundation; recovery of 24kg. ganja would simply

show that search was made and seizure was effected.

13). From the statements of P.W.5 Meshram, the person who conducted the search and took part in the investigation, it appears that after seeing the on-comin vehicle he stopped the same, made search and after finding that the said vehicle might ~~be~~ having some contra-band articles, he immediately issued a notice under section 50 of the Act. From his statement, it does not appear that he was trying to fix the accused. In his lengthy cross-examination, he stated that in fact the accused persons were present in the Car and in compliance of provisions of Section 50 of the Act, notices were given. I have already observed that non-compliance of Section 50 of the Act cannot give death blow to the prosecution case, because of non-applicability of Section 50 of the Act to search of a vehicle. From his statements, it appears that after recovering the contraband ganja, samples were drawn, the accused and the articles were brought to the Police Station, F.I.R. was registered and further steps were taken. The samples already drawn were sent for chemical analysis. It also appears that the vehicle and ganja were given to the Mal-Moharrir who made proper entries in the concerned registers.

14). Shri Prashant Mishra, learned counsel for the appellants submits that the Court below was unjustified in not relying upon the document Ex.D/1-C and the statement of Ramnath Polai (D.W.1). According

to him, the signatures of Tarik Ahmed on Ex.D/1 have been proved by D.W.1 Ramnath, therefore, there was no reason for the trial Court to dis-believe the statement and contents of Ex.D/1-C.

15). The person who made entries in the Sana has not been examined by the defence. A.S.I. Ramnath Polai (D.W.1) simply stated that the entries in Ex.D/1-C were made by Tarik Ahmed. He does not say a single word about the correctness of the contents of the entry. A person who made entries in some registers if is alive, is required to be examined by the defence to prove that the person who made entries did it in his official capacity and in the regular course of work. Unfortunately the person examined by the defence did not make the entries/ there, he cannot prove the correctness of the contents. In the present case, examination of Tarik Ahmed was all the more required in view of the interpolations regarding the number of the vehicle in Ex.D/1-C. For the reasons best known to the defence they did not examine Tarik Ahmed. About Tilusingh regarding whom certain statements have been recorded in Ex.D/1, on one side the defence says that A.S.I. Tilusingh had gone to Kotparh(Orissa) for apprehending the accused Pramod, but at the same time that suggestion was given to P.W.3 T.S.Thakur. It is not the case of the defence that T.S.Thakur and Tilusingh are same persons. The Court below has given cogent reasons for relying upon the statements of the prosecution witnesses and rejecting the defence case.

16). After hearing the learned counsel for the parties at length and going through the entire evidence,

I am unable to hold that the Court below recorded a wrong finding about the guilt of each of the appellant.

17). Learned counsel for the appellants submits that the Court below was not justified in convicting each of the appellants under Section 20(b)(i)separately for possessing ganja and for transporting the same.

18). Learned counsel for the State was unable to support that part of the judgment.

19). Section 20 of N.D.P.S. Act,1985 reads as under :-

> "20.- Punishment for contravention in relation to cannabis plant and cannabis - whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder -
>
> (a) Cultivates any cannabis plant; or
>
> (b). produces, manufactures,possesses, sells, purchases,transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -
>
> (i) Where such contraventionrelates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;
>
> (ii) Where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees;
>
> Provided that the Court may, for reasons to be recorded in the judgment impose a fine exceeding two lakh rupees."

Section 20 of the Act for the present purposes if is read, would read as - Whoever in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder. : (b) produces, manufactures, possesses, sells, purchases, transports imports inter-State, export inter-State or uses cannabis

shall be punishable - (i) and (ii). Possession and transportation both are punishable under Section 20(b) (i) of the Act.

20). In a case where contrabands are found in possession of a person , then such person can positively be convicted because he was possessing the said contra-bands, but a person who is transporting it cannot be convicted under two different acts that he possessed it and was also transporting it. When a man transports the contra-bands, he is deemed to possess it. If a man does not possess it, either physically or constructively he cannot transport it. It would be a different case where some-body books contrabands from one destination to another then in such situation he can be convicted for transporting simpliciter; but in a case where person himself is transporting the contrabands, then he cannot be convicted separately for possessing the articles and transporting the same. The Court below was unjustified in awarding separate sentences for transporting and possessing the contrabands.

21). The charges levelled against the present appellant were that he was possessing the contrabands and he was transporting the same, therefore, he was liable to be punished for each act. The question still would be as to under what provision of law or for what offences the accused is to be convicted.

22). In the opinion of this Court, the accused can be convicted simply for the charge for possessing the contrabands. It would be one single charge and one single punishment has to be awarded. The Court below

has awarded 3 years R.I. and 1 year R.I. for different heads. It does not appear from the judgment of the Court below that for which offence sentences of 3 years and 1 year R.I. has been awarded.

23). Be that as it may, taking into consideration the totality of the circumstances, I am of the opinion that the ends of justice would meet if jail sentences awarded to the appellants are reduced to the period of 2 years.

24). The appeal is partly allowed. Instead of awarding separate sentences for possessing and transporting the contrabands, each of the appellant is awarded one single sentence of 2 years R.I. and pay fine of Rs.5,000/-. In default of payment of fine, each of the appellant shall undergo R.I. for six months.

25). The appeals are partly allowed to the extent indicated above.

Sd/-
R.S. Garg
Judge

/Sibbu/.